IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.161 OF 2006

IN

SUIT NO.3660 OF 2005

WITH

CIVIL APPLICATION NO.222 OF 2006

Binay Bahadur Srivastava & Ors. ...Appellants

Versus

Maharashtra Housing & Area Development Authority & Ors. ...Respondents

.....

Mr.B.B.Srivastava for Appellants.

None for Respondents.

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CORAM: A.M.KHANWILKAR, J.

MARCH 7, 2006.

P.C.

1. Heard Counsel for the Appellants. I see no reason to interfere with the discretionary order passed by the Court below in permitting the Defendant Nos.1 and 2 to file written statement on record. The Court below, which has exercised that discretion has noted two reasons. The first is

that in view of Order VIII Rule 1 as amended and applicable to Bombay and secondly, the Plaintiffs themselves were not diligent in serving the suit summons within thirty days from the filing of the Suit, discretion has been exercised in favour of the Defendants 1 and 2.

2. I see no merit in the objection raised on behalf of the Appellants that such discretion could not have been used and is impermissible in law. The Counsel for the Appellants would rely on provisions of Order V Rule 1, 2nd proviso and Order VIII Rule 10 to contend that these amendments have been effected in the year 2002 with specific purpose and cannot be overlooked inspite of the provision such as Order VIII Rule 1 as applicable in view of the Bombay Amendment. The argument, though attractive, cannot be of any avail to the Appellants. The discretion to grant further time to the Defendants to file written statement still remains with the Court and which will have to be exercised in appropriate cases. The Court below has considered the fact situation of the present case to show that discretion in favour of

Defendants 1 and 2.

3. Thus understood, it is not possible to countenance the submission canvassed on behalf of the Appellants. Counsel for the Appellants would then rely on the decision of the Apex Court in **Shaikh Salim Haji Abdul Khayumsab vs. Kumar & Ors. reported in AIR 2006 SC 396**. Emphasis was placed on the dictum of the Apex Court in the context of the maxim of equity, namely, *actus curiae neminem gravabit* - an act of Court shall prejudice no man, and the maxim *lex non cogit ad impossibilia* - the law does not compel a man to do what he cannot possibly perform shall apply to the case. It was contended that none of these was applicable to the present case. The argument, however, overlooks the observations made by the Apex Court in the same decision that the provisions such as Order VIII Rule 1 as introduced after amendment of 2002, does not deal with the power of the Court and also does not specifically take away the power of the Court to take the written statement on record though filed beyond time as provided under the law. This very decision further observes that the nature of

the provision contained in Order VIII Rule 1 is procedural. It is not a part of substantive law. The only purpose of introducing such provision was to curb the mischief of unscrupulous Defendants adopting dilatory tactics, delaying the disposal of cases, causing inconvenience to Plaintiffs and Petitioners approaching Court for quick relief. In the present case, it is not in dispute that the Summons was served on the Defendants on 15th October 2005. The Suit was listed on 22nd October 2005 as is stated across the bar by the Counsel for the Appellants. However, on that date, period of thirty days from the service of summons was not over. The Suit was then notified on 3rd December 2005 and once again on 16th January 2006. It is stated that however, on both these dates, the Defendants did not enter appearance though the standing Counsel for the Authority was available in the Court. Indeed, that may be so but it is obvious that on 2nd February 2006, the Defendants moved a formal application along with the written statement disclosing the cause for the delay. The Court below has entertained that application and has exercised the discretion in favour of the

Defendants.

4. Understood thus, it is not a case where the disposal of the Suit has been delayed by adopting dilatory tactics as such. In the interest of justice, and to permit the Authority to contest the proceedings which is representing public interest, the Court was justified in exercising discretion in favour of the Defendants to permit it to file written statement on record. Accordingly, there is no merit in this Appeal. The same is dismissed.

5. In view of the above order, cognate Civil Application also stands disposed of.

A.M.KHANWILKAR, J.